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Comparative Fault and Intentional Torts

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COMPARATIVE FAULT AND INTENTIONAL TORTS

I. INTRODUCTION

In *Li v. Yellow Cab Co.*,[1] the California Supreme Court abolished contributory negligence and instituted a "pure" comparative negligence system[2] under which liability for an injury is allocated between plaintiff and defendant in direct proportion to the amount of negligence attributable to each party in bringing about the injury.[3] Since *Li*, commentators have speculated on how far this equitable doctrine should be extended.[4] Although the *Li* opinion was limited to a negligence action between one plaintiff and one defendant, the court recognized that the comparative fault doctrine is potentially applicable to other situations. However, the court declined to elaborate on these applications, prefer-

1. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

2. *Id.* at 827, 532 P.2d at 1242, 119 Cal. Rptr. at 874. The *Li* court considered and rejected another form of comparative negligence called the "50 percent" rule, which apportions liability based on fault up to the point at which the plaintiff's fault is equal to or greater than that of the defendant; at that point, plaintiff is precluded from further recovery. *Id.*

3. *Id.* at 828-29, 532 P.2d at 1243, 119 Cal. Rptr. at 875. Following the *Li* decision, there was uncertainty as to whether apportionment of damages was to be only among the named parties to the action, or whether the term "parties" as used by the court was meant to include all individuals causing the incident giving rise to plaintiff's injuries. It was suggested that fault and liability should be apportioned among all the individuals responsible for the plaintiff's losses, even if those individuals were not before the court as named parties. Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1, 33-37 (1953); Braun, *Contribution: A Fresh Look*, 50 CAL. ST. B.J. 166, 202-03 (1975); Schwartz, *Li v. Yellow Cab Company: A Survey of California Practice Under Comparative Negligence*, 7 PAC. L.J. 747, 763 (1976); CALIFORNIA JURY INSTRUCTIONS CIVIL, No. 14.91 (6th rev. ed. 1977). This doubt was resolved by American Motorcycle Ass'n. v. Superior Ct., 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), in which the court held that parties responsible for the plaintiff's injury but not named in the complaint can be brought into the action by the cross-complaint of a named defendant, and held liable for their proportionate negligence. *Id.* at 607, 578 P.2d at 917, 146 Cal. Rptr. at 200.

4. *See, e.g.*, Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337 (1977); Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants*, 50 S. CAL. L. REV. 73 (1976), suggesting that comparative fault should not be extended to strict product liability actions. *Contra*, V. SCHWARTZ, COMPARATIVE NEGLIGENCE 207-09 (1974) [hereinafter cited as SCHWARTZ]. CAL. CIV. CODE § 1714 (West 1973) provides a very flexible guideline for the assignment of liability:

> Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.

ring to deal with them on a case-by-case basis.[5]

Recently, the California Supreme Court has reiterated its determination to apply equitable principles to the allocation of tort liability by extending the "comparative fault" concept, as it has come to be termed, to other areas of tort law. In *American Motorcycle Association v. Superior Court*,[6] the court decided that in a negligence action involving two or more defendants, liability should be apportioned according to the proportionate fault of each defendant, rather than on a pro rata basis.[7] In *Daly v. General Motors Corp.*,[8] the court expanded the comparative fault doctrine to actions based on strict liability. Finally, in *Safeway Stores, Inc. v. Nest-Kart*,[9] the court ruled that comparative fault principles should be used to apportion damages between a negligent tortfeasor and one liable under strict liability. However, the court has not yet determined whether comparative fault principles should be extended to actions involving intentional misconduct. Eventually, such a decision will be necessary, as current practices in intentional tort actions are inconsistent with the *Li* principle of comparative fault and its subsequent expansion.

Presently, an intentional tortfeasor is held fully liable for his conduct,[10] regardless of the plaintiff's fault,[11] unless he can shift total liability back to the plaintiff by proving that the plaintiff "consented" to his action.[12] Furthermore, in a California action involving one joint

5. 13 Cal. 3d at 826, 532 P.2d at 1241-42, 119 Cal. Rptr. at 873-74.

6. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

7. To determine liability on a pro rata basis, the total liability is divided by the number of defendants, and each defendant is held liable for an equal percentage of the total liability.

8. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

9. 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

10. RESTATEMENT (SECOND) OF TORTS § 481 (1965). In California, the measure of damages is established by CAL. CIV. CODE § 3333 (West 1970), which provides:

> For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

This statute is a variable guideline for damages, however, and courts are likely to impose liability for extended damages in an intentional tort action. *See generally* Note, *The Tie That Binds: Liability of Intentional Tort-Feasors for Extended Consequences*, 14 STAN. L. REV. 362 (1962).

11. It is generally held that negligence is no defense to an intentional tort. Bartosh v. Banning, 251 Cal. App. 2d 378, 385, 59 Cal. Rptr. 382, 387 (1967) (assault); Van Meter v. Bent Constr. Co., 46 Cal. 2d 588, 593, 297 P.2d 644, 647 (1956) (fraud).

12. 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1212 (1956). The presence of consent is determined according to a reasonable person's interpretation of plaintiff's conduct. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 101 (4th ed. 1971) [hereinafter cited as PROSSER]. Consent is not, strictly speaking, a defense but rather acts to negative the commission of an intentional tort. *Id.* at 101. *But cf.* People v. Samuels, 250 Cal. App. 2d 501, 513, 58

tortfeasor[13] guilty of intentional misconduct and another guilty of negligence, the negligent tortfeasor may have a cause of action for full implied indemnity against the intentional tortfeasor. If the indemnity action is successful, the intentional wrongdoer will ultimately be liable for all of plaintiff's losses, regardless of the extent of the negligent defendant's fault.[14] At present, in an action involving multiple defendants where all defendants are guilty of intentional wrongdoing, the courts refuse to inquire into their relative fault. In the latter situation, if one tortfeasor pays all or any part of the judgment, he cannot force the others to pay either the pro rata share associated with an action for contribution, nor that part of the damages attributable to the other de-

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Cal. Rptr. 439, 447 (1967) ("[C]onsent of the victim is not generally a defense to assault or battery, except in a situation involving ordinary physical contact or blows incident to sports. . .").

In special situations, other methods of shifting liability back to the plaintiff may be available. For instance, where the defendant's own interests, or those of the public, require him to act as he does, and social policy is best served by permitting his actions, the defendant can assert the defense of privilege and avoid some or all liability for his conduct. PROSSER, *supra* note 12, at 98-99. Where force is necessary to prevent threatened harmful or offensive bodily contact, or intentional or negligent confinement, the defendant can avoid liability provided the force he used was reasonable under the circumstances. *Id.* at 108. Defense of others may also be pleaded by the defendant in order to avoid liability for any injury sustained by the plaintiff. *Id.* at 112-13. Defense of property and recapture of chattels may also be invoked in order to shift any liability of the defendant back to the plaintiff. *Id.* at 113, 117.

13. For the purposes of this discussion, "joint tortfeasors" will mean two or more individuals jointly or severally liable in tort for the same injury to person or property, whether or not a judgment has been rendered against some or all of them, and regardless of whether their individual acts were successive, concurrent, or in concert.

14. Gardner v. Murphy, 54 Cal. App. 3d 164, 168-69, 126 Cal. Rptr. 302, 304 (1975). Full implied indemnity is determined by the "active-passive negligence" test which is defined as follows:

> "The right of *indemnity* rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible by the law to an injured party. . . . The difference between primary and secondary liability is not based on a difference in *degrees* of negligence or on any doctrine of *comparative* negligence,—a doctrine which, indeed, is not recognized by the common law. . . . It depends on a difference in the *character* or *kind* of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person. . . . But the important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible."

Sanders v. Atchison, Topeka & Santa Fe Ry., 65 Cal. App. 3d 630, 637-38, 135 Cal. Rptr. 555, 559 (1977)(quoting Builders Supply Co. v. McCabe, 366 Pa. 322, 325-26, 77 A. 2d 368, 370 (1951)). In *Gardner*, the court applied the active-passive test and concluded that the intentional wrongdoer's liability was based on active misconduct, while the negligent tortfeasor's misconduct was merely passive. 54 Cal. App. at 169, 126 Cal. Rptr. at 304.

fendants' intentional fault.[15]

This comment will examine current decisions of the California Supreme Court extending comparative fault principles beyond the *Li* doctrine, and suggest that it would be consistent with this trend of expansion to extend comparative fault to actions based on intentional misconduct.[16]

II. THE EXPANSION OF COMPARATIVE FAULT AND INTENTIONAL TORTS

Many of the former debates regarding the extension of *Li*'s comparative fault doctrine to actions involving non-negligent misconduct centered around a modification of the court's original decision. An earlier version of the opinion, which fixed liability in relation to causal responsibility,[17] was amended to allocate liability in direct proportion to the parties' relative fault,[18] adding that the broad meaning of fault was limited to "'negligence' in the accepted legal sense."[19]

While Dean Prosser, upon whom the court relied heavily in the *Li* decision, has suggested that "[i]n the legal sense, 'fault' has come to mean no more than a departure from the conduct required of a man by society for the protection of others . . . ,"[20] some commentators con-

15. CAL. CIV. PROC. CODE § 875(d) (West Supp. 1978) provides: "There shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person."

16. Such a policy would also be well within the flexible language of CAL. CIV. CODE § 1714 (West 1973); *see* note 4 *supra*.

17. A passage of the original opinion stated that "*fault* and *culpability* are the quantities to be measured, not mere physical causation." *See* Fleming, *The Supreme Court of California 1974-75, Foreward: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L.REV. 239, 249 n.46 (1976).

18. 13 Cal. 3d at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864.

19. *Id.* at 813 n.6a, 532 P.2d at 1232 n.6a, 119 Cal. Rptr. at 864 n.6a. The original *Li* opinion was not so restricted. *See* note 17 *supra*.

20. PROSSER, *supra* note 12, at 18. Two states have adopted statutes which contain similar definitions of fault and appear to be worded broadly enough to codify comparative fault as between a plaintiff and defendant in cases of intentional misconduct. The Arkansas statute provides in pertinent part:

> 27-1763. "Fault" defined.—The word "fault" as used in this Act . . . includes any act, omission, conduct, risk assumed, or breach of warranty or breach of any legal duty which is a proximate cause of any damages sustained by any party.

ARK. STAT. ANN. §§ 27-1763 to 1765 (Cum. Supp. 1977).

Similarly, the Maine legislature has adopted the following pertinent language:

> 156. Comparative negligence.
>
> . . .
>
> Fault means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this section, give rise to the defense of contributory negligence.

tend that comparative fault concepts have no application outside an action based on negligence.[21] This latter position was soundly rejected by the California Supreme Court in *Daly v. General Motors Corp.*[22] While recognizing the "theoretical and semantic distinctions" between traditional negligence and the judicially formulated theory of strict liability,[23] the court nevertheless extended comparative fault principles to cases based on strict liability.[24] In so doing, the court commented: "If a more just result follows from the expansion of comparative principles, we have no hesitancy in seeking it, mindful always that the fundamental and underlying purpose of *Li* was to promote the equitable allocation of loss among all parties legally responsible in proportion to their

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ME. REV. STAT. tit. 14, § 156 (Cum. Supp. 1977-1978).

While the title "Comparative negligence" appears to preclude the application of the Maine statute to allow apportionment of damages where the defendant has engaged in intentional wrongdoing, the wording of the statute addressing the application of comparative fault principles is not in terms of negligence, but solely in terms of fault, which as defined in the statute can clearly encompass intentional torts. A Maine commentator has stated that " 'Comparative negligence' is syonymous with 'damage apportionment' and it is unfortunate that the former term has been retained when the latter defines the concept well." The author then used the two terms interchangeably in his discussion of the statute. Note, *Comparative Negligence: Some New Problems for the Maine Courts*, 18 ME. L. REV. 65, 67 (1966).

Furthermore, the United States Supreme Court has stated:

> [T]he name given to an act by way of designation or description . . . cannot change the plain import of its words. If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.
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> . . . [W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names. . . .

Caminetti v. United States, 242 U.S. 470, 490 (1917).

In a similar vein, while the UNIFORM COMPARATIVE FAULT ACT § 1(b) (1977) does not include intentional torts, apparently because "[s]tatutes and decisions have not applied the comparative fault principle to them. . . ." The comment to that section states that a court "determining that the general principle should apply at common law to a case before it of an intentional tort is not precluded from the holding by the Act." *Id.* (Commissioner's Comment).

It is therefore suggested that the *Li* court's dicta suggesting that it would not extend comparative fault to intentional torts, 13 Cal. 3d at 826, 532 P.2d at 1241, 119 Cal. Rptr. at 873, is inconsistent with the legal definition of fault as suggested by Prosser and adopted by two state legislatures.

21. *See, e.g.*, Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337, 351-56 (1977); Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants*, 50 S. CAL. L. REV. 73 (1976).

22. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

23. *Id.* at 734, 575 P.2d at 1167, 144 Cal. Rptr. at 385.

24. *Id.* at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390.

fault."[25] Since the court had little difficulty holding that loss should be equitably apportioned in strict liability cases, actions not traditionally based on "fault,"[26] and rejected the restrictive definition of the *Li* court,[27] it would be consistent to apply comparative fault principles to an action which *is* based on fault, albeit intentional fault.

A. Apportionment of Fault between Plaintiff and Defendant

Under certain circumstances, an individual may be negligent in permitting an act or omission which he should realize involves an unreasonable risk of intentional, or even criminal harm to others,[28] *i.e.*, the failure to foresee and guard against the intentional misconduct of a third party where a reasonably prudent person would do so.[29] This situation specifically deals with foreseeable intentional harm; therefore, the legal principles applicable to third party intentional harm could also be applied as between a negligent plaintiff and an intentional tortfeasor.

In the third party cases, various factors are considered before concluding an individual was negligent in contributing to intentional misconduct. Factors balanced in this approach[30] include the known character, past conduct and tendencies of the person who intentionally caused the harm, the temptation or opportunity the situation may afford for such misconduct, the gravity of the harm which may result, the burden of the precautions which the actor would be required to take,[31] and the importance of the right which the actor is asserting by his con-

25. *Id.* at 737, 575 P.2d at 1169, 144 Cal. Rptr. at 387.

26. "We think that apportioning tort liability is sound, logical and capable of wider application than to negligence cases alone." *Id.* at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390. In Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963), the California Supreme Court established strict products liability as a separate cause of action not based upon negligence, stating "[a] manufacturer is *strictly liable in tort* when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." (emphasis added).

27. *See* notes 17-19 *supra* and the accompanying text.

28. RESTATEMENT (SECOND) OF TORTS § 302B (1965).

29. "[O]ne doing an act which a reasonably prudent person would not do, or failing to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate conduct of human affairs is guilty of negligence." Travelers Indem. Co. v. Titus, 265 Cal. App. 2d 515, 519, 71 Cal. Rptr. 490, 493 (1968).

30. RESTATEMENT (SECOND) OF TORTS § 302B, Comment f (1965).

31. The burden of guarding against another's intentional wrongdoing usually outweighs the risk of such misconduct. Feezer & Favour, *Intervening Crime and Liability for Negligence*, 24 MINN. L. REV. 635, 648 (1940); PROSSER, *supra* note 12, at 174.

duct.[32] Under this formulation of negligence, defendants have been held liable to a plaintiff intentionally injured by a third person, where the negligent defendant created a situation "inviting" intentional injury to the plaintiff, and the risk of the intentional injury was sufficiently foreseeable.[33]

However, under current law, a negligent plaintiff who "invites" an intentional injury can escape responsibility for his actions, as traditionally, a plaintiff's recovery has not been reduced by his own negligence in an intentional tort action.[34] Thus, at present, in cases of foreseeable intentional harm, the law determines liability solely on the status of an individual as a plaintiff or defendant.[35] This result appears to be patently inconsistent with the *Li* holding that both plaintiff and defendant should bear the burden of liability according to their relative fault. Where an individual creates an unreasonable risk that someone will be injured by subsequent intentional misconduct, the fact that it is the same negligent individual who invited the conduct that is injured should not relieve him of all liability for his negligence.

One rationale for the reluctance of the courts to reduce a negligent plaintiff's recovery in an intentional tort action is that negligence and

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32. In determining the standard [of care] to be required, there are two chief matters for consideration. The first is the magnitude of the risk to which other persons are exposed, while the second is the importance of the object to be attained by the dangerous form of activity. The reasonableness of any conduct will depend upon the proportion between these two elements. To expose others to danger for a disproportionate object is unreasonable, whereas an equal risk for a better cause may lawfully be run without negligence.

P. FITZGERALD, SALMOND ON JURISPRUDENCE 385 (12th ed. 1966). *See also* PROSSER, *supra* note 12, at 425; RESTATEMENT (SECOND) OF TORTS § 473, Comment d (1965).

33. *See generally* Hergenrether v. East, 61 Cal. 2d 440, 393 P.2d 164, 39 Cal. Rptr. 4 (1964); Murray v. Wright, 166 Cal. App. 2d 589, 333 P.2d 111 (1958); Richardson v. Ham, 44 Cal. 2d 772, 285 P.2d 269 (1955). It has also been noted:

It cannot fairly be said as a matter of law, and should not be categorically laid down, that crime is entirely unexpectable in any situation where the stage set by the original wrongdoer's negligence affords an opportunity for crime to any person with criminal impulse who may happen to appear on the scene.

Feezer & Favour, *Intervening Crime and Liability for Negligence*, 24 MINN. L. REV. 634, 648 (1940).

34. *See* note 11 *supra* and the accompanying text.

35. The courts are not reluctant to impose full liability upon a negligent defendant when the negligent conduct was the failure to foresee and guard against another's intentional tort resulting in injury to the plaintiff. *See, e.g.*, Hergenrether v. East, 61 Cal. 2d 440, 393 P.2d 164, 39 Cal. Rptr. 4 (1964); Murray v. Wright, 166 Cal. App. 2d 589, 333 P.2d 111 (1958). It should be noted that these cases involved intentional tortfeasors who could not be located for suit. If the intentional tortfeasor can be found, the negligent tortfeasor may attempt to shift all his liability to the intentional tortfeasor-defendant through indemnity. *See* text accompanying notes 79-84, *infra*. However, with respect to the plaintiff, the negligent tortfeasor remains jointly and severally liable.

intentional wrongdoing are said to be different types of fault, as opposed to different points on a continuum of fault, and that they are therefore not comparable.[36] This argument is no longer compelling after *Daly*, where the court rejected the argument that a plaintiff's negligence should not reduce his recovery in a products liability case because the two types of "fault" involved, negligence and strict liability, were of different types which could not be compared.[37] After noting that contributory negligence is probably a misnomer since it lacks an essential element of traditional negligence, namely, a duty of care owed to another,[38] the court refused to "permit plaintiff's own conduct relative to the product to escape unexamined, and as to that share of plaintiff's damages which flows from his own fault we discern no reason of policy why it should, following *Li*, be borne by others."[39] The court accordingly ordered that the plaintiff's and manufacturer's fault be compared in order to properly apportion liability.[40]

A second rationale for imposing full liability on an intentional tortfeasor is that of deterrence.[41] Thus, imposing full liability upon an intentional tortfeasor may serve both as a punishment and a deterrence of similar conduct in the future. However, the deterrent effect of such a practice is speculative at best.[42] Furthermore, the principle underlying all tort law is compensation,[43] not punishment. When *Li* introduced comparative negligence, the compensatory principle was reinforced; neither plaintiff nor defendant are "punished" by being held liable for damages not attributable to their fault.

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36. PROSSER, *supra* note 12, at 426.

37. 20 Cal. 3d at 734-37, 575 P.2d at 1167-69, 144 Cal. Rptr. at 385-87.

38. *Id.* at 735, 575 P.2d at 1167-68, 144 Cal. Rptr. at 385-86.

39. *Id.* at 737, 575 P.2d at 1169, 144 Cal. Rptr. at 387.

40. *Id.* at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390.

41. PROSSER, *supra* note 12, at 23. ("The 'prophylactic' factor of preventing future harm has been quite important in the field of torts.") The law is also concerned with deterring others from similar misconduct. *Id.* at 9.

42. Note, *The Tie That Binds: Liability of Intentional Tort-Feasors for Extended Consequences*, 14 STAN. L. REV. 362, 364-65 (1962).

43. Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1, 7 (1953)("The civil action for a tort. . . is commenced and maintained by the injured person himself, and its purpose is to compensate him for the damage he has suffered, at the expense of the wrongdoer.") *See generally* 1 T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 478-81 (1906), indicating that in determining a plaintiff's recovery compensation is the major goal, but that punishment may be a factor in the imposition of either compensatory or punitive damages. However, one commentator has suggested that while compelling a defendant to pay the amount of plaintiff's loss is, from the plaintiff's view, compensation, it is punishment as viewed from the defendant's position. P. FITZGERALD, SALMOND ON JURISPRUDENCE 103 (12th ed. 1966).

While there may be a place for punishment in a civil suit,[44] such punishment is provided by punitive damages, and not by the imposition of compensatory damages.[45] In California, punitive damages require proof that the defendant acted with "oppression, fraud or malice" in perpetrating his misconduct.[46] The stricter requirements for imposing punishment for the sake of example in a civil action emphasize that while punishment may be appropriate in some instances, it is not to be confused with the main tort goal of compensating the plaintiff for damages caused by the fault of another.[47] Thus, punishment in the form of holding an intentional tortfeasor liable for compensatory damages not

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44. The validity of awarding punitive damages in a civil suit has been questioned. *See, e.g.*, Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957); Note *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U.L. REV. 1158 (1966).

45. 1 T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 478-79 (1906).

46. CAL. CIV. CODE § 3294 (West 1970) provides:

> In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

This statute has traditionally been interpreted to mean that punitive damages are not justified unless the defendant's conduct is intentional. G. D. Searle & Co. v. Superior Ct., 49 Cal. App. 3d 22, 31, 122 Cal. Rptr. 218, 224 (1975); Davis v. Hearst, 160 Cal. 143, 172, 116 P. 530, 543 (1911). However, there was dissatisfaction with this requirement, and the *Searle* court suggested that a different standard be applied: "We suggest *conscious disregard of safety* as an appropriate description of the animus malus which may justify an exemplary damage award when nondeliberate injury is alleged." 49 Cal. App. 3d at 32, 122 Cal. Rptr. at 225.

The court in Seimon v. Southern Pac. Transp. Co., 67 Cal. App. 3d 600, 607-09, 136 Cal. Rptr. 787, 791-92 (1977) applied the *Searle* "conscious disregard" test where defendant railroad had continued to maintain a crossing in a dangerous manner after being put on notice of the possibility of harm resulting from the dangerous condition. The court, after analyzing the defendant's conduct under the conscious disregard of safety theory, reversed the trial court's nonsuit on the issue of punitive damages and ordered a retrial. *Id.* at 608-09, 136 Cal. Rptr. at 792. Therefore, it now appears that in California, punitive damages can be awarded for what used to be classified as a cause of action for negligence. Thus, an expanded definition of malice has been created by the courts which permits recovery of punitive damages based upon conduct which lies somewhere between gross negligence or recklessness and intentional misconduct.

47. In practice, however, the distinction between compensation and punishment is often blurred. For instance, a nineteenth century Wisconsin case was tried three times in three different counties, resulting in three identical verdicts. Two of the verdicts included exemplary damages and one verdict was based solely on compensatory damages. 1 T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 480 n.8 (1906)(citing Bass v. Chicago & Northwestern Ry., 36 Wis. 450 (1874)(verdict for plaintiff of $4,500 under instruction allowing punitive damages); Bass v. Chicago & Northwestern Ry., 39 Wis. 636 (1876)(verdict for plaintiff of $4,500 under instruction allowing only compensatory damages); Bass v. Chicago & Northwestern Ry., 42 Wis. 654 (1877)(verdict for plaintiff of $4,500 under instruction allowing punitive damages)).

attributable to his fault is not a proper method of furthering society's interest in reducing the number of intentional torts.

As noted previously, the intentional tortfeasor is relieved of liability when the plaintiff's conduct is found to constitute consent;[48] in such a case, the plaintiff is totally precluded from recovery. Since such consent and assumption of the risk, in the context of a negligence action, are analogous,[49] it is instructive to examine the treatment of the assumption of the risk doctrine under recent decisions as well as the effect of this treatment in determining liability.

Prior to *Li*, negligence actions were based on an all-or-nothing approach: the defendant was totally liable unless he could shift liability back to the plaintiff through an absolute defense.[50] One method of accomplishing this result was to show that the plaintiff had assumed the risk of the defendant's conduct.[51] In *Li*, the court incorporated the assumption of the risk doctrine into the comparative fault evaluation in order to determine proportionate liability.[52] Thereafter, the *Daly* court noted that if the *Li* principle of assumption of the risk were not followed in a products liability case, the same conduct which would merely reduce a plaintiff's recovery in a negligence suit would completely bar his recovery under a strict liability theory.[53]

This anomalous result, rejected by the *Daly* court, will continue to be given effect in intentional tort actions if the court does not further extend comparative fault principles. Under existing California

48. *See* note 12 *supra* and accompanying text.

49. Valencia v. San Jose Scavenger Co., 21 Cal. App. 2d 469, 473, 69 P.2d 489, 482 (1937); PROSSER, *supra* note 12, at 101; 1 CAL. JUR. 3d, *Actions* § 24 (1972).

50. The contributory negligence doctrine, which was in effect in California until the *Li* court adopted comparative negligence, was an all-or-nothing approach to determining liability. Any negligence on the part of a plaintiff would bar recovery where it was to some degree a proximate or immediate cause of plaintiff's injury. Straten v. Spencer, 52 Cal. App. 98, 103-05, 197 P. 540, 542-43 (1921). Thus, the plaintiff could either recover all his losses or none of them; apportionment of damages was not allowed. *Id.* at 106-07, 197 P. at 543-44.

51. PROSSER, *supra* note 12, at 440. Basically, the defense of assumption of the risk negated any duty of care owed by the defendant to the plaintiff. *Id.* Other methods of shifting total liability back to the plaintiff included proving that the plaintiff had contributed to his own injuries, thus invoking the contributory negligence doctrine to bar recovery. *See, e.g.*, Gyerman v. United States Lines Co., 7 Cal. 3d 488, 498 P.2d 1043, 102 Cal. Rptr. 795 (1972)(finding plaintiff's negligence did not proximately cause his injuries); Robinson v. Harrington, 195 Cal. App. 2d 126, 15 Cal. Rptr. 322 (1961) (plaintiff's contributory negligence a proximate cause of his injuries). Under the doctrine known as "last clear chance," where both the plaintiff and defendant were negligent, the plaintiff could shift total liability back to the defendant by proving that the defendant had an opportunity to avoid injuring the plaintiff despite the plaintiff's negligence. PROSSER, *supra* note 12, at 428.

52. 13 Cal. 3d at 825, 532 P.2d at 1241, 119 Cal. Rptr. at 873.

53. 20 Cal. 3d at 738, 575 P.2d at 1169, 144 Cal. Rptr. at 387.

law, if a defendant's conduct is found to be intentional, what is termed assumption of the risk in a negligence action totally precludes a plaintiff's recovery because it will be said that he "consented." If, on the other hand, defendant is found liable of conduct somewhat less serious than intentional wrongdoing, liability will be apportioned according to the relative fault of plaintiff and defendant. Such a system, encouraging "adroit pleading and selection of theories"[54] can easily result in injustice, especially since the distinction between negligence,[55] gross negligence,[56] and intent[57] is often very difficult to make.[58] Indeed, even

54. *Id.*

55. For a definition of negligence, *see* note 29 *supra*.

56. Gross negligence has been repeatedly defined in the California cases as: "the want of slight diligence," "an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others," and "that want of care which would raise a presumption of the conscious indifference to consequences." People v. Pfeffer, 224 Cal. App. 2d 578, 580, 36 Cal. Rptr. 838, 839 (1964) (quoting People v. Costa, 40 Cal. 2d 160, 166, 252 P.2d 1, 5 (1953)). In California, gross negligence gives rise to harsher legal consequences than ordinary negligence. Donnelly v. Southern Pac. Co., 18 Cal. 2d 863, 871, 118 P.2d 465, 469 (1941).

57. "[W]illfulness and intent denote deliberation or design. . . ." G. D. Searle & Co. v. Superior Ct., 49 Cal. App. 3d 22, 31, 122 Cal. Rptr. 218, 224 (1975).

58. Special terms have been devised to account for conduct deviating from the standard definitions of negligence, gross negligence, and intent. For example, the term "wanton and wilful misconduct" "'implies the intentional doing of something either with knowledge, express or implied, that serious injury is a probable, as distinguished from a possible, result, or the intentional doing of an act with a wanton and reckless disregard of its consequences.'" Christian v. Bolls, 7 Cal. App. 3d 408, 418, 86 Cal. Rptr. 545, 551 (1970)(quoting Williams v. Carr, 68 Cal. 2d 579, 584, 440 P.2d 505, 509, 68 Cal. Rptr. 305, 309 (1968)). While such conduct has been equated with "gross negligence," Mahoney v. Corralejo, 36 Cal. App. 3d 966, 973, 112 Cal. Rptr. 61, 64 (1970), other courts have said such conduct is "[something] more than mere negligence, however gross, but less than the conventional intentional tort. . . ." Kroiss v. Butler, 129 Cal. App. 2d 550, 556, 277 P.2d 873, 877 (1954). The *Li* court cited with approval jury instructions defining wilful or wanton misconduct as "intentional wrongful conduct, done either with knowledge, express or implied, that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results." 13 Cal. 3d at 825 n.19, 532 P.2d at 1241 n.19, 119 Cal. Rptr. at 873 n.19. The *Li* court further indicated that comparative negligence may be applied in an action involving such misconduct. *Id.* at 826, 532 P.2d at 1241, 119 Cal. Rptr. at 873. However, an appellate court indicated wilful misconduct is more like intentional misconduct. Goldman v. House, 93 Cal. App. 2d 572, 575, 209 P.2d 639, 641 (1949). It is generally held that the consequences and legal rules pertaining to intentional torts may be applied in actions involving wanton and wilful misconduct. Mahoney v. Corralejo, 36 Cal. App. 3d 966, 973, 112 Cal. Rptr. 61, 64 (1974); Olea v. Southern Pac. Co., 272 Cal. App. 2d 261, 265-66, 77 Cal. Rptr. 332, 335 (1969).

Furthermore, now that punitive damages can apparently be awarded for misconduct done with conscious disregard of others' safety, *see* note 46 *supra*, there seems to be even less reason for applying comparative negligence in an action involving "conscious disregard of safety," a type of conduct considered so onerous as to support an award of punitive damages, while denying the application of comparative fault principles to an action involving intentional misconduct.

the courts have differed as to the proper characterization of a defendant's actions based on the same factual situation.[59] This problem is exacerbated in a system which allows comparison not only of ordinary negligence, but of gross negligence.[60] Gross negligence is so hard to distinguish from intentional misconduct that one commentator has suggested renaming it "negligent wilful conduct" in order to encompass the varying judicial interpretations of this kind of behavior.[61]

The extension of comparative fault principles to intentional tort actions may serve to allow recovery in situations where current practices deny it, even if a plaintiff's conduct is not found to constitute consent. For example, in an action for intentional misrepresentation, the plaintiff is required to prove that his reliance upon the misrepresentation

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In short, where the conduct in question approaches intentional misconduct, the courts have not dealt with it in a consistent manner, even in their definitions. However, once the courts have decided which category of conduct best fits the behavior, the arbitrary nature of that decision is forgotten, and the consequences of the classification, *i.e.*, the application of comparative negligence and punitive damages, follows automatically. *See, e.g.*, Billingsley v. Westrac Co., 365 F.2d 619, 623 (8th Cir. 1966)(construing Arkansas comparative negligence statute).

59. It is not uncommon for cases tried on a negligence cause of action to be reversed on appeal because the appellate court found the defendant's conduct to be intentional. *See, e.g.*, Schulze v. Kleeber, 10 Wis. 2d 540, 103 N.W.2d 560 (1960)(mayor and police sued for injuries sustained when police officer, at mayor's direction, ejected plaintiff from city council meeting); Munoz v. Olin, 76 Cal. App. 3d Adv. Sh. 85, 142 Cal. Rptr. 667 (1977), *hearing granted*, No. 2-50451 (Feb. 16, 1978) (comparative fault principles applied to case in which decedent was killed by police officer; appellate court found officer's action intentional).

Complaints have also been amended midway through trial to change the basis of the action from an intentional tort action to a negligence action. *See, e.g.*, Celmer v. Quarberg, 56 Wis. 2d 581, 203 N.W.2d 45 (1973). And sometimes there is dissent among the justices as to whether conduct should be classified as negligent or intentional. *See, e.g.*, Kagel v. Brugger, 19 Wis. 2d 1, 119 N.W.2d 394 (1963).

60. The Wisconsin Supreme Court has abolished the category of gross negligence; gross negligence is now treated as ordinary negligence under the Wisconsin comparative negligence system. Bielski v. Schulze, 16 Wis. 2d 1, 17-18, 114 N.W.2d 105, 113 (1962). Commentators have urged that this approach be adopted. SCHWARTZ, *supra* note 4, at 108; Posner, Reeslund & Williams, *Comparative Negligence in California: Some Legislative Solutions—Part II*, L.A. Daily J. Rep., Aug. 26, 1977, at 5. The *Li* court noted that such arguments were persuasive. 13 Cal. 3d at 825-26, 532 P.2d at 1241, 119 Cal. Rptr. at 873. In the past, some California courts required a plaintiff to foresee and guard against gross negligence. *See, e.g.*, Taylor v. Volfi, 86 Cal. App. 244, 247, 260 P. 927, 928 (1927). *But see*, Mahoney v. Corralejo, 36 Cal. App. 3d 966, 973, 112 Cal. Rptr. 61, 64 (1974), stating that contributory negligence will not be applied when defendant's conduct is grossly negligent, although such conduct is included in the general term "negligence."

61. SCHWARTZ, *supra* note 4, at 105. This combination of terms is designed to accomodate "wilful negligence" within comparative negligence. However, California courts have long viewed the two concepts as having separate and distinct meanings. Giminez v. Rissen, 12 Cal. App. 2d 152, 160, 55 P.2d 292, 297 (1936).

was justifiable before any recovery is allowed.[62] While it has been observed that this practice is analogous to denying recovery due to contributory negligence,[63] the courts and commentators have generally refused to admit that they are denying recovery for an intentional tort due to the plaintiff's own negligence. Even if the plaintiff in an intentional misrepresentation action was negligent, the fact that he was injured by intentional misconduct remains.

It would appear to be more consistent with *Li* and the compensation goal of tort law to require that the damages recovered by a negligent plaintiff in an intentional tort action be reduced in proportion to the plaintiff's fault. In reality, due to the weighing of factors, such as the foreseeability of risk and the burden of taking precautions, which is required prior to a finding that the plaintiff was negligent, there are probably few times in which a plaintiff's recovery would be substantially reduced, if at all, due to his own negligence. Furthermore, if the plaintiff could prove malice, oppression or fraud on the part of the defendant, the reduction in compensatory damages would be more than offset by the recovery of punitive damages. Therefore, by extending comparative fault to include intentional torts, the courts would not only retain consistency[64] in the development of comparative fault but would also obviate the inequities which result from restricting the definition of "fault" to "negligent fault."[65]

B. Between Intentional Tortfeasors

As noted above, California Code of Civil Procedure section 875(d) specifically precludes the use of contribution as a means of apportioning liability between two or more intentional tortfeasors.[66] In contrast, comparative fault concepts have been expanded under the same statute to encompass actions basing liability on comparative fault among negligent defendant tortfeasors in a manner similar to the developments in actions apportioning liability between a negligent plaintiff and defendant. In *American Motorcycle Association v. Superior Court*,[67] the California Supreme Court held that damages must be apportioned among

62. Seeger v. Odell, 18 Cal. 2d 409, 414, 115 P.2d 977, 980 (1941); PROSSER, *supra* note 12, at 715-16. *See also* Note, *Deceit*, 16 VAL. L. REV. 749, 762-64 (1930).

63. *See* authorities cited note 62 *supra*.

64. The *Li* court expressed concern that liability be assigned on a "just and consistent basis." 13 Cal. 3d at 812, 532 P.2d at 1231, 119 Cal. Rptr. at 863.

65. *See* note 20 *supra*.

66. *See* note 15 *supra* and accompanying text.

67. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

negligent tortfeasors according to their respective fault,[68] and in *Safeway Stores, Inc. v. Nest-Kart*,[69] the court applied the doctrine in an action involving a negligent defendant and a defendant liable on the basis of products liability.[70]

Both of those decisions used the doctrine of "partial indemnity" to by-pass the California contribution statute mandating that liability between non-intentional tortfeasors be apportioned on a pro rata basis. In altering that aspect of indemnity which totally shifts liability, the *American Motorcycle* court followed the lead of a New York decision[71] which first enunciated the concept of "partial indemnity."[72] That court has since reiterated its decision to permit "apportionment of damages among joint or concurrent tort-feasors regardless of the degree or nature of the concurring fault,"[73] prompting the New York legislature to rewrite its contribution statutes to allow the application of comparative fault principles in the context of a cause of action for contribution,[74] rather than requiring resort to the rather artificial doctrine of partial indemnity. Thus, if the California courts choose to follow the progressive New York attitude, partial indemnity will undoubtedly be expanded to effect apportionment of liability based on fault among *all* tortfeasors, regardless of the characterization of their wrongdoing as negligent or intentional.

It is quite possible that the court will indeed continue in the footsteps of New York in light of the ease with which the California Supreme Court circumvented a similar contribution statute and years of case law to apply comparative fault to apportion damages among a negligent

68. *Id.* at 599, 578 P.2d at 912, 146 Cal. Rptr. at 195.

69. 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

70. *Id.* at 332, 579 P.2d at 446, 146 Cal. Rptr. at 555.

71. In Dole v. Dow Chem. Corp., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), the New York Supreme Court contravened contribution statutes similar to those currently in effect in California by formulating the "partial indemnity" concept. For the legislative response to this decision, *see* note 74 *infra*. It is interesting to note that shortly before the *American Motorcycle* decision, the Illinois Supreme Court adopted equitable apportionment between defendant tortfeasors in a series of three cases, even though Illinois has not yet adopted comparative negligence between plaintiff and defendant. *See* Skinner v. Reed-Prentice Div., 70 Ill. 2d 1, 374 N.E.2d 437 (1977); Stevens v. Silver Mfg. Co., 70 Ill. 2d 41, 374 N.E.2d 455 (1977); International Harvester Co., 70 Ill. 2d 47, 374 N.E.2d 458 (1977).

72. 20 Cal. 3d at 597-98, 578 P.2d at 911, 146 Cal. Rptr. at 194.

73. Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 29, 236 N.E.2d 241, 243, 334 N.Y.S.2d 851, 854 (1972).

74. N.Y. CIV. PRAC. LAW §§ 1401-1404 (McKinney 1976). The sponsor's memo to these sections notes that the changes in the contribution statutes to provide for apportionment of damages were a logical outgrowth of the judicial decisions.

and strictly liable defendant.[75] While the California Supreme Court has noted that the goal of both indemnity[76] and contribution[77] is "the equitable distribution of loss among multiple tortfeasors,"[78] the two concepts have historically been applied in different situations. Since the rationale underlying the application of these two principles to defendant tortfeasors is different, each will be discussed separately.

1. Indemnity and Comparative Fault

Indemnity originally developed as an equitable exception to the common law rule disallowing contribution between negligent tortfeasors;[79] where one tortfeasor was more culpable than the other, the more culpable party was made to bear the loss.[80] However, because judicial practices at that time were based on an all-or-nothing approach rather than apportionment, indemnity developed as a means of shifting total liability.[81]

California adopted the practice of applying indemnity to allow a less negligent defendant to shift total liability to a more negligent one,[82] and similarly a negligent defendant could shift total liability to an intentional defendant.[83] This procedure was justified by reference to the difference in the character of the fault involved.[84] By allowing a negligent tortfeasor to escape all consequences of his own acts through indemnity, the California courts in effect gave him the same status as a negligent plaintiff in an intentional tort action. It is questionable whether this practice is based on sound social policy.[85] First, the negli-

75. For a discussion tracing the history of this development, see Safeway v. Nest-Kart, 21 Cal. 3d 322, 327-32, 579 P.2d 441, 443-46, 146 Cal. Rptr. 550, 552-55 (1978).

76. Indemnity has traditionally been used to shift the entire loss from one tortfeasor to another, rather than to effect an apportionment of the loss. Leflar, *Contribution and Indemnity between Tortfeasors*, 81 U. PA. L. REV. 130, 131 (1932) [hereinafter cited as Leflar].

77. Contribution is a method of dividing damages between multiple tortfeasors, traditionally calculated by dividing the total recovery by the number of defendants found liable. *See, e.g.*, CAL. CIV. PROC. CODE § 876(a) (West Supp. 1978)("The pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them.").

78. 20 Cal. 3d at 592, 578 P.2d at 907, 146 Cal. Rptr. at 190.

79. *Id.* at 593, 578 P.2d at 908, 146 Cal. Rptr. at 191.

80. *Id.* at 594, 578 P.2d at 908, 146 Cal. Rptr. at 191.

81. *Id.*

82. *See, e.g.*, Cahill Bros. v. Clementina Co., 208 Cal. App. 2d 367, 382, 25 Cal. Rptr. 301, 309 (1962); Alisal Sanitary Dist. v. Kennedy, 180 Cal. App. 2d 69, 75, 4 Cal. Rptr. 379, 383 (1960) (quoting Builders Supply Co. v. McCabe, 366 Pa. 322, 325-26, 77 A.2d 368, 370 (1951)).

83. Gardner v. Murphy, 54 Cal. App. 3d 164, 126 Cal. Rptr. 302 (1975).

84. *Id.* at 168, 126 Cal. Rptr. at 304; *see generally* cases cited note 82 *supra*.

85. "Is there any sound public policy which justifies a rule of law which exculpates from

gent tortfeasor, since uninjured, can hardly assert the tort goal of compensation on his own behalf. Second, the courts are not reluctant to hold a negligent defendant fully liable for a plaintiff's losses should the intentional tortfeasor be judgment-proof.[86] Finally, as discussed previously, shifting full liability is not a proper method of punishing the intentional tortfeasor and deterring future misconduct in the context of a civil action.[87] Indeed, in *Safeway*, when applying comparative fault between a negligent tortfeasor and one liable in strict liability, the California Supreme Court noted that although the theories of liability may be different, "fairness and other tort policies, such as deterrence of dangerous conduct or encouragement of accident-reducing behavior, frequently calls for an apportionment of liability among multiple tortfeasors."[88] Referring to *Daly*, the *Safeway* court reiterated that perceived different types of "fault" will not preclude the courts from apportioning liability on a comparative basis,[89] and noted that a system in which such a comparison could not be made would lead to "bizarre, and indeed irrational, consequences."[90] Similar unreasonable results can now occur and will continue to occur in intentional tort actions unless the court allows apportionment of damages between negligent and intentional defendants. Under the present system, even a grossly negligent tortfeasor can escape *all* liability if he can convince the court that his co-defendant's misconduct was "intentional," thus placing himself in a better position than a defendant found to have been negligent in the ordinary meaning of that term, who is forced to bear his proportionate share of the liability merely because his co-defendant's conduct was also only negligent.

There are indications that the California courts may be less willing to hold an intentional tortfeasor fully liable when a negligent tortfeasor

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liability an admitted wrongdoer merely because a second wrongdoer has intervened and assisted in causing the plaintiff's harm?" Eldredge, *Culpable Intervention As Superseding Cause*, 86 U. PA. L. REV. 121, 129 (1937).

86. *See, e.g.*, Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976)(plaintiffs in wrongful death case had cause of action against regents and psychotherapists where a dangerously violent patient threatened to kill a specific individual, and despite their knowledge, defendants failed to warn the intended victim); Hergenrether v. East, 61 Cal. 2d 440, 393 P.2d 164, 39 Cal. Rptr. 4 (1964)(employees and employer held liable for plaintiffs' damages where employees negligently left keys in two-ton truck which was subsequently stolen by an unidentified third party who negligently caused the truck to collide with plaintiffs' vehicle).

87. *See* notes 44-47 *supra* and accompanying text.

88. 21 Cal. 3d at 330, 579 P.2d at 445, 146 Cal. Rptr. at 554.

89. *Id.* at 331, 579 P.2d at 446, 146 Cal. Rptr. at 555.

90. *Id.* at 332, 579 P.2d at 446, 146 Cal. Rptr. at 555.

also contributed to plaintiff's loss. In *Gardner v. Murphy*,[91] a negligent tortfeasor sought indemnity against an allegedly intentional tortfeasor. Although the court allowed the cause of action,[92] it noted that questions of contribution were involved. While the court declined to rule on those issues because they had not been argued by counsel, it expressly stated that this result did not bar the intentional tortfeasor from bringing a later action for contribution.[93] The *Gardner* court also noted that if "exact justice" were to be done, apportionment of liability based on fault would be allowed between all joint tortfeasors in a tort action.[94] If it would be more equitable to apportion damages between negligent and intentional joint tortfeasors, there is little logic in a rule prohibiting an intentional tortfeasor from forcing another intentional tortfeasor, also at fault, to bear a proportionate amount of the liability.

2. Contribution and Comparative Fault

Traditionally, apportionment of liability between joint tortfeasors has been accomplished through the doctrine of contribution.[95] Accordingly, when the California legislature dealt with the apportionment of liability between two or more tortfeasors, it did so by enacting contribution statutes.[96] California Code of Civil Procedure section 875(d) flatly prohibits any contribution between intentional joint tortfeasors,[97] incorporating the common law practice[98] which is still the rule in a majority of jurisdictions.[99] However, in light of the California Supreme Court's statement that "the existing contribution statutes do

91. 54 Cal. App. 3d 164, 126 Cal. Rptr. 302 (1975).

92. *Id.* at 168-69, 126 Cal. Rptr. at 304.

93. *Id.* at 166 n.2, 126 Cal. Rptr. at 302-03 n.2.

94. *Id.*

95. 20 Cal. 3d at 592, 578 P.2d at 907, 146 Cal. Rptr. at 190.

96. CAL. CIV. PROC. CODE §§ 875-880 (West Supp. 1978).

97. *See* note 15 *supra*.

98. The case credited with formulating this practice is Merryweather v. Nixan, 101 Eng. Rep. 1337 (1799), which involved the intentional tort of conversion. PROSSER, *supra* note 12, at 305.

99. PROSSER, *supra* note 12, at 308. The UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1 (1939, revised 1955) defined joint tortfeasors as "two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." Section 2 of the 1939 Act establishes a right of contribution among joint tortfeasors, which the Commissioner's Note to that section states is not confined to negligent tortfeasors.

The 1939 Act was substantively adopted in only eight states: Arkansas (1941); Delaware (1949); Hawaii (1941); Maryland (1941); New Mexico (1947); Pennsylvania (1951); Rhode Island (1940); and South Dakota (1945). UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1955 Revision)(Commissioner's Prefatory Note).

However, because of the general resistance to the provisions of the 1939 Act, a total revi-

not in themselves necessarily prohibit apportionment of liability among multiple tortfeasors on a comparative fault basis,"[100] the policy underlying the rule denying contribution to intentional tortfeasors should be examined to determine whether this old practice should be laid to rest.

The main arguments for retaining this rule were also advanced to support the now-defunct common law rule denying apportionment of damages between joint tortfeasors under any circumstances.[101] However, when the California legislature adopted the contribution statutes, it did provide solutions for many of the problems present under common law. These solutions would apply equally if apportionment of damages according to fault were applied to intentional tortfeasors.

Two closely related arguments for continuing the no-contribution rule were designed to promote rapid compensation for the plaintiff.[102] First, there was the fear that defendants who settled rapidly would have no guarantee of immunity from a later suit by a joint tortfeasor seeking contribution, and that therefore tortfeasors would be reluctant to settle and expose themselves to the possibility of double liability.[103] However, this problem was remedied by the California statute[104] providing that in a negligence action, a good faith settlement[105] reduces the plain-

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sion was enacted in 1955. This version specifically denies contribution among intentional tortfeasors. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(c) (1955 Revision).

Other states also have contribution statutes which are worded broadly enough to encompass intentional tortfeasors: MO. STAT. ANN. § 537.060 (Vernon 1953); N.Y. CIV. PRAC. LAW §§ 1401-1404 (McKinney 1976); TEX. CIV. STAT. art. 2212 (Vernon 1971); W. VA. CODE § 55-7-13 (1966). *See also* note 20 *supra*.

100. 21 Cal. 3d at 328, 579 P.2d at 444, 146 Cal. Rptr. at 553.

101. For a discussion of these arguments as applied primarily to negligent tortfeasors, see Leflar, *supra* note 76, at 131-39; Note, *Contribution and Indemnity in California*, 57 CALIF. L. REV. 490, 499-502 (1969); Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. CAL. L. REV. 728, 730-32 (1968).

102. Rapid settlement of claims was one of the goals of the 1957 California legislature when it enacted the California contribution statutes. River Garden Farms, Inc. v. Superior Ct., 26 Cal. App. 3d 986, 993, 103 Cal. Rptr. 498, 503 (1972).

103. James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1160-61 (1941).

104. Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort—(a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater; and (b) It shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors.

CAL. CIV. PROC. CODE § 877 (West Supp. 1978).

105. The "good faith" requirement is met by a settling tortfeasor if the amount paid in satisfaction is "within a reasonable range of the settlor's fair share." River Garden Farms, Inc. v. Superior Ct., 26 Cal. App. 3d 986, 998, 103 Cal. Rptr. 498, 506 (1972).

tiff's recovery against the other tortfeasors in the amount of the settlement or a stipulated figure,[106] and further relieves the settling defendant from all liability for contribution.[107] If liability were apportioned according to fault, both settling and non-settling tortfeasors could invoke the protection provided by this statute.[108] Thus, an intentional tortfeasor would have no more reluctance to enter a rapid pretrial settlement than does a negligent tortfeasor.

A second fear was that by not allowing a plaintiff to threaten a defendant with full liability if settlement were not reached quickly, the plaintiff's negotiating power would be diminished.[109] This argument ignores the fact that joint and several liability has not been abrogated by the *Li* decision;[110] the plaintiff retains his full power to bring suit against any one joint tortfeasor for the entire damages.[111] Allowing one intentional tortfeasor a cause of action against the other intentional tortfeasor would merely allow the liable party to recover sums paid by him for damages not caused by his fault. The plaintiff, having already been compensated, need not be involved in this action and so would not be unduly prejudiced or inconvenienced.[112] Thus, the goal of rapid plaintiff compensation could still be served while allowing damages to be apportioned according to fault, even among intentional tortfeasors.

Another major argument supporting the present statutory scheme denying liability based on fault between intentional tortfeasors is that the courts dislike helping a wrongdoer shift liability to another.[113] However, even in the absence of legislative mandate, the courts are now willing to determine relative fault, at least as between negligent

106. This practice was continued under the *American Motorcycle* scheme of partial indemnity. 20 Cal. 3d at 604, 578 P.2d at 915, 146 Cal. Rptr. at 198.

107. The *American Motorcycle* court recognized the strong public policy favoring rapid settlement and concluded that in order to continue this policy, it is necessary to discharge a tortfeasor making a reasonable settlement in good faith from liability for partial indemnity as well. *Id.*

108. CAL. CIV. PROC. CODE § 879 (West Supp. 1978) provides that the provisions of the contribution statutes are severable. Thus, the settlement provision could be retained even if the provision disallowing contribution among intentional tortfeasors were abolished.

109. James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1160-61 (1941).

110. 20 Cal. 3d at 586-91, 578 P.2d at 903-07, 146 Cal. Rptr. at 186-90.

111. *Id.* at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189. Of course, under current California law, the named defendant can bring other parties allegedly also responsible for plaintiff's losses into the lawsuit by way of a cross-complaint against them. *Id.* at 607, 578 P.2d at 917, 146 Cal. Rptr. at 200. However, this ability on the part of defendants to allocate damages does not diminish the plaintiff's power of recovery. *See* note 112 *infra* and the accompanying text.

112. 20 Cal. 3d at 606-07, 578 P.2d at 917, 146 Cal. Rptr. at 200.

113. *Id.* at 592, 578 P.2d at 907, 146 Cal. Rptr. at 190.

tortfeasors. This argument, therefore, has been eroded to the point that to use this philosophy as the sole basis for continuing an inequitable rule is highly questionable.

A closely related proposition is that the denial of judicial aid punishes past misconduct and discourages similar future misconduct.[114] However, as was discussed earlier, the main goal of tort law is compensation of the plaintiff, and punitive damages are the proper vehicle for imposing punishment.[115] Furthermore, while the critics of the common law no-contribution rule have not seriously questioned its applicability to intentional tortfeasors, it has been observed that "there is absolutely no factual proof that the rule operates effectively as punishment and discouragement to wrongdoers, or that the law's attitude of dignified aloofness serves any good purpose whatever, whether the would-be litigant be a double-dyed villain, or only an ordinary imprudent man."[116] Indeed, to the extent that imposing any liability acts as punishment, it would be more consistent to "punish" all intentional tortfeasors, rather than holding one fully liable and allowing the others to go scot-free.[117] Aside from the fact that the deterrent effect of imposing full liability on intentional tortfeasors has never been substantiated,[118] it has been pointed out that a "sporting chance" of escaping all liability might actually increase willingness to engage in misconduct.[119] While this proposition may or may not be true, the present rule disallowing a cause of action for equitable apportionment of damages certainly provides an intentional tortfeasor with additional incentive to evade judicial process. If he can disappear until a co-defendant settles or is brought to judgment and pays the obligation voluntarily or through judicial execution, he is free from any liability both to the plaintiff and the co-tortfeasor.

The thought has been advanced that if multiple intentional tortfeasors act in concert, in furtherance of a common purpose, there is no basis upon which liability may be apportioned, because the intentional tortfeasors are equally responsible for the entire damage.[120] The validity of this argument is questionable. The California Supreme Court has indicated that the basis for apportioning liability is not nec-

114. Leflar, *supra* note 76, at 133.
115. *See* notes 43-47 *supra* and accompanying text.
116. Leflar, *supra* note 76, at 139.
117. *Id.* at 133.
118. *Id.* at 134; Note, *The Tie That Binds: Liability of Intentional Tort-Feasors for Extended Consequences*, 14 STAN. L. REV. 362, 364-65 (1962).
119. Leflar, *supra* note 76, at 133-34.
120. PROSSER, *supra* note 12, at 314-15.

essarily direct causation, in the physical sense, but may be based upon fault, *i.e.*, the relative culpability of each defendant tortfeasor.[121] Furthermore, any time joint and several liability is found, even in a pure negligence action, each defendant tortfeasor is held fully liable for the damage, regardless of the amount of damage he actually "caused."[122] It therefore seems clear that where intentional tortfeasors are equally at fault, each should be responsible for his pro rata share of the damages, and that one defendant should be able to recover from the others any sums paid in excess of that amount. Certainly this would be a more logical solution than allowing one intentional tortfeasor to avoid all liability and forcing the other to make full satisfaction of a judgment.

Of course, punitive damages would not be affected by allowing a cause of action for equitable apportionment. Under the present state of the law in California, punitive damages, if any, may be assessed against the several defendants in differing amounts,[123] or they may be awarded against one or more of the defendants and not others.[124] Since, among other considerations, these damages are based on the degree of culpability or the existence of actual malice,[125] such damages should remain strictly several in effect and not a part of the compensatory liability for which equitable apportionment can be sought.

III. CONCLUSION

The California courts should extend comparative fault concepts to actions involving intentional tortfeasors at the earliest opportunity. Such an extension will be consistent with, and is made necessary by, recent California Supreme Court decisions apportioning liability according to relative fault among all parties to negligence and strict liability cases. A failure to give intentional tortfeasors the benefit of comparative fault principles will lead to inequitable results. Furthermore, sound social policy requires that this change in the current law be made.

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121. *See* notes 17-18 *supra* and accompanying text; Fleming, *The Supreme Court of California 1974-75, Foreward: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239, 249 (1976).

122. *See* text accompanying notes 110-12 *supra*.

123. Thomson v. Catalina, 205 Cal. 402, 407-08, 271 P. 198, 200-01 (1928).

124. Kim v. Chinn, 56 Cal. App. 2d 857, 860-61, 133 P.2d 677, 678-79 (1943).

125. *See* note 46 *supra* and accompanying text.